No. 83-1872

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et. al.*,
Petitioners

v.

METROPOLITAN DADE COUNTY, FLORIDA, *et. al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND PROPOSED BRIEF AMICUS CURIAE OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution permit Metropolitan Dade County, Florida, purposely to discriminate against all non-Black construction contractors and subcontractors under the relevant circumstances?

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MOTION OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Associated General Contractors of America, Inc. (hereinafter "AGC"), respectfully moves this Court, pursuant to Supreme Court Rule 36, for leave to file the attached proposed brief *amicus curiae* in support of the petition for a writ of certiorari in this proceeding. In support of this motion, AGC states as follows:

1. Pursuant to Supreme Court Rule 36, AGC requested consent of the parties to the filing of the proposed

brief *amicus curiae*, and received consent from Petitioners but not from Respondents. Although filing of a motion for leave to file *amicus curiae* in support of a petition for a writ of certiorari without consent of all parties is not favored under the Court's rules, AGC's strong member interest in special preference programs and its long experience in the construction industry make AGC uniquely situated to provide assistance to this Court on the matters raised in this proceeding.

2. AGC is a national trade association consisting of 111 state and local chapters. AGC's 32,000 member firms, including approximately 8,500 of America's leading general contracting businesses, are made up of large, medium and small firms, as well as minority or women owned firms. These firms operate in the construction industry throughout the United States, including Dade County, Florida, and are responsible for the employment of 3.5 million workers.

3. Construction is the largest industry in the United States representing approximately 8 percent of the nation's Gross National Product. AGC members perform almost 80 percent of the general contracting construction work performed in the United States each year, including the construction of commercial buildings, highways, industrial and municipal-utility facilities, and public construction such as the rapid transit system involved in this case.

4. AGC members include a large number of firms which bid on, negotiate for, and undertake public construction of all types which in an increasing number of jurisdictions is subject to racial or sexual preferences, set asides, quotas or goals under various state or local laws.* Because of its race exclu-

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* For example, Richmond, Va., Ordinance 83-69-59 (April 11, 1983) requires 30 percent of all city construction to be awarded

sivity, the Dade County ordinance at issue here is of particular concern to AGC's members, but AGC is also broadly concerned about the trend toward similar ordinances.

5. AGC strongly supports free, open and fair competition for public works construction projects because such an approach means value for taxpayers and opportunities for all contracting firms, minority and otherwise. From an overall industry perspective, AGC views limitations on competition as unwise, but particularly destructive are denials of opportunity based solely on the race of the contractor. Race specific contracting is not only contrary to the constitutional rights of those excluded, but it increases construction costs by limiting competition. Moreover, those businesses operating in the sheltered, noncompetitive atmosphere of a racial or sexual preference may not develop the hardiness to survive outside that green house in this highly competitive industry. Such preferences ensure not equal opportunity, but seriatim opportunity based on race or sex.

6. AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal Government. This includes assistance to courts in

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to minority business enterprises (hereinafter "MBEs"). Seattle, Wash., Ordinance 109-113 (June 17, 1980) sets utilization levels of 15 percent for MBEs, and 3 percent for women's business enterprises (hereinafter "WBEs"), on city projects, and disqualifies bidders not reaching those levels. The Charlotte, N.C., Minority/Women's Business Enterprise Plan (October 26, 1981) set a 16 percent MBE goal and 4 percent WBE goal for fiscal year 1982. A partial list of other jurisdictions with MBE and/or WBE ordinances includes Atlanta, Ga.; Washington, D.C.; Richmond, San Diego and Los Angeles, Calif.; Cincinnati, Ohio; Boston, Mass.; Philadelphia, Pa.; Portland, Ore.; New York, N.Y.; and Takoma, Wash.

their deliberations on significant matters concerning public contracting policies, labor-management relations, and labor standards in the construction industry, such as the issues Petitioners seek to bring to this Court. As an *amicus curiae*, AGC assisted this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and more recently, *Edward J. DeBartolo v. NLRB*, —— U.S. ——, 103 S.Ct. 2926 (1983), and *Building and Construction Trades Department, AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 975 (1984).

7. AGC's objective as an *amicus curiae* is to support constitutional rights and competition in the construction industry. AGC's sixty-five years of experience in the construction industry place it in a unique position to serve the Court as an *amicus curiae* in this proceeding.

For the foregoing reasons, AGC respectfully requests that (1) this Motion for Leave to File Brief *Amicus Curiae* in Support of the Petition for Writ of Certiorari be granted, (2) that the attached proposed brief *amicus curiae* be accepted for filing, and that, (3) AGC be permitted to file a brief as *amicus curiae* on the merits in the event that the petition for writ of certiorari is granted.

Respectfully submitted,

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PROPOSED BRIEF AMICUS CURIAE OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Subject to the foregoing motion for leave to file as an *amicus curiae*, the Associated General Contractors of America, Inc. (hereinafter "AGC"), respectfully submits this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

INTEREST OF THE AMICUS CURIAE

The foregoing motion for leave to file as an *amicus curiae* fully states AGC's interest in the question presented.

STATEMENT OF THE CASE

I. The Factual Setting

This case concerns a county's procedures for awarding public construction contracts. The case revolves around two decisions in July and October of 1982. In July, per Ordinance No. 82-67 (July 20, 1982) (hereinafter "Ordinance 82-67"), the Board of County Commissioners for Dade County, Florida (hereinafter "the Commission"), authorized itself to designate general construction contracts "for competition solely among black contractors." *South Florida Chapter* v. *Metropolitan Dade County*, 552 F. Supp. 909, 919-920 (S.D. Fla. 1982). The Commission also authorized goals for Black subcontractors—goals which general contractors would have to make "every reasonable effort" to meet, in order to qualify for public contracts. *Id.*

The following October, per Resolution No. R-1350-82 (October 5, 1982) (hereinafter "Resolution R-1350-82"), the Commission exercised its new authority, designating the Earlington Heights station, one component of the county's new Metrorail system, for competition solely among Black contractors. *Id.*, at 923-924. The Commission also imposed a 50% Black subcontractor goal on that project. *Id.*

Roughly one year before the Commission took these steps, four separate sets of experts had carefully examined the economic and other circumstances of the Blacks residing in Dade County. *Id.*, at 914-916. In reports submitted to the Commission, these experts found the circumstances to be most troubling, and further, to justify some kind of Commission response. *Id.* None of these experts, however, attributed the circumstances to racial discrimination. *Id.* To the contrary, one of the reports determined that Black business development in Dade County had fallen far behind that of Blacks in most major cities elsewhere in the United States. *Id.*,

at 915. Another determined that the Black businessmen in Dade County had not kept pace with the gains which Black businessmen had made nationally. *Id.*, at 914-915.

At the same time, other statistical data revealed that 1.4 percent of Dade County's 1977 construction volume had gone to Black contractors and subcontractors—though Blacks, at that time, had owned only one percent of *all* business establishments in Dade County. *Id.*, at 914.

Nevertheless, in November of 1981, the Commission adopted Resolution No. R-1672-81 (November 3, 1981) (hereinafter "Resolution R-1672-81"), "recogniz[ing] the reality that past discriminatory practices have, to some degree, adversely affected our present economic system and have impaired the competitive position of businesses owned and controlled by Blacks . . . ." *Id.*, at 916. In the same resolution, the Commission also noted "a statistically significant disparity between the county's Black population and both the number of Black businesses within the County and those receiving County contracts." *Id.*

The record is devoid of any other Board "findings" of prior racial discrimination. *Id.*, at 912-927. Ordinance 82-67, adopted nine months later, adverts to one additional report, but does not supplement the earlier "findings." Ordinance 82-67, *supra.*

Rather than set any overall limits on either the set-asides or the subcontractor goals, Ordinance 82-67 requires the county manager to establish procedures for review of each construction contract which the county proposes to fund, in whole or in part—"to determine whether the inclusion of race-conscious measures," specifically including set-asides and subcontractor goals, "will foster participation of qualified Black contractors and subcontractors in the contract work." *Id.* Nor does the ordinance set an expiration date, or define the circumstances under which it would expire.

The implementing regulations require the Commission to consider set-asides whenever three Black general contractors are believed to be capable of doing the work. 552 F. Supp. at 920-922, 922 n.9. Further, they require subcontractor goals to "relate to the potential availability of Black-owned firms," defining availability to include "all Black-owned firms with places of business . . . within the Dade County geographic area." *Id.*

As of August of 1982, the Commission had used open competitive bidding to award the majority of the contracts for the Dade County Metrorail system. *Id.*, at 918. That had led the Commission to award approximately 7% of the Metrorail and related construction to Black contractors and subcontractors. *Id.*, at 917.

Because the federal government was also funding the system, the Urban Mass Transit Administration had imposed independent federal goals for minority business enterprises (hereinafter "MBEs"). As of September of 1982, the federal MBE goal on the system was 16.5%. *Id.*, at 919. The MBE participation was 19.6%. *Id.*

In October of 1982, when the Commission adopted Resolution R-1350-82, setting-aside the contract for the Earlington Heights station, and imposing a 50% Black subcontractor goal on that project, the Commission determined that a sufficient number of Black prime contractors were available, Resolution R-1350-82, *supra*, though "no Black prime contractors in Dade County [were] qualified to perform major county construction projects," 552 F.Supp. at 926. "[T]he county . . . solicited and recruited major, well-established Black prime contractors from outside Dade County and the State of Florida . . . ," *id.*, but secured only two bids for the work. *Id.*, at 925.

Metropolitan Dade County has no racial or ethnic majority. Using preliminary 1980 Census data, the Commission has estimated that 16% of the county's residents

are Black, that another 41% are Hispanic, and that the remaining 43% are non-Hispanic Whites. *Id.*, at 914.

II. The Decisions Below

After granting a temporary injunction against the Commission's exercise of its new authority, the United States District Court for the Southern District of Florida (hereinafter "the District Court") held that the set-aside provisions of the ordinance are unconstitutional, both as written and as applied. The District Court upheld the subcontractor goals. *South Florida Chapter* v. *Metropolitan Dade County, supra.*

On appeal, a panel of the United States Court of Appeals for the Eleventh Circuit (hereinafter "the Court of Appeals") upheld the set-aside and the subcontractor goals. *South Florida Chapter* v. *Metropolitan Dade County*, 723 F.2d 846 (11th Cir. 1984).

A petition for rehearing, and suggestion for *en banc* consideration, were denied on March 22, 1984. *South Florida Chapter* v. *Metropolitan Dade County*, No. 83-5001 (11th Cir. March 22, 1984).

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Supreme Court should grant the petition for a writ of certiorari because the Court of Appeals addressed an important but unsettled question of federal law, and in the process, the Court of Appeals contravened *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (hereinafter "*Bakke*") and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (hereinafter "*Fullilove*"). *See* Sup. Ct. R. 17.1(c). The question presented is no less important than the question of purposeful racial discrimination in access to public facilities, for the Commission has denied all non-Black construction contracts and subcontractors access to public construction. The question is unset-

tled, and readily merits the Supreme Court's attention, because the Commission has asserted a remedial interest in its racial discrimination. Both *Bakke* and *Fullilove* concerned remedial measures, but neither produce an analytical consensus among the Justices of this Court. The Court of Appeals contravened *Bakke* and *Fullilove* in that it disregarded the dispositive elements of those decisions.

The extreme facts of this case present the Supreme Court with a unique opportunity to arrive at an analytical consensus in a critical but unsettled area of constitutional law. The bottom line is that this case is at least several steps beyond *Fullilove.*

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Addressed an Important but Unsettled Question of Federal Law.

The Commission engaged in purposeful racial discrimination. Ordinance 82-67 "is more than race conscious, *it is race exclusive.*" 552 F. Supp. at 935 (emphasis in original). Whether the ordinance and its subsequent implementation therefore violate the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, is an important federal question which the Supreme Court should settle.

More than forty years ago, this Court confirmed that racial discrimination has to be "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943). Further, this Court held that "all legal restrictions which curtail the rights of a single racial group are immediately suspect," and that the "courts must subject them to the most rigid scrutiny." *Korematsu* v. *United States,* 323 U.S. 214, 215 (1944). Heeding these principles, this Court proceeded to reject racially restrictive covenants among private property owners, *Shelly* v.

Kramer, 334 U.S. 1 (1948), and racial segregation in elementary public education, *Brown* v. *Board of Education*, 347 U.S. 483 (1954). In rapid succession, this Court then rejected racial discrimination in access to public beaches, *Mayor of Baltimore* v. *Dawson*, 350 U.S. 877 (1955), public golf courses, *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955), public buses, *Gayle* v. *Browder*, 352 U.S. 903 (1956), public parks, *New Orleans City Park Imp. Ass'n* v. *Detiege*, 358 U.S. 54 (1958) and state courtrooms, *Johnson* v. *Virginia*, 373 U.S. 61 (1963). More than twenty years ago, this Court could declare that "it is no longer open to question that a State may not constitutionally require segregation of public facilities." *Id.*, at 62.

No twist of logic can justify a legal distinction between the use of public facilities and their construction. In either case, the action is state action subject to the Fourteenth Amendment. Thus, this case is at least as important as the early cases on access to public facilities. Notwithstanding the early cases, and many more recent cases, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1969), the Court of Appeals held that the Commission's purposeful discrimination against all non-Black construction contractors and subcontractors does not violate the Equal Protection Clause, *supra*.

To be sure, *Bakke* and *Fullilove* have raised the new issues which the remainder of this brief explores. Amicus AGC submits that a fair and candid reading of *Bakke* and *Fullilove* requires this Court to reverse the Court of Appeals. Nevertheless, Amicus AGC has to concede the obvious: that neither *Bakke* nor *Fullilove* produced an analytical consensus. These decisions have not settled the constitutional limitations on racial discrimination. As the District Court succinctly noted, "no clear guidance has emerged in this tangled area of the law." 552 F. Supp. at 929.

II. The Decision Below Conflicts with the Decisions of the Supreme Court.

The Supreme Court decisions which are most readily applicable to this case are the two already highlighted: *Bakke* and *Fullilove*. The Court of Appeals overlooked and therefore neglected the dispositive elements of these decisions.

Bakke struck down a special admissions program at the medical school of the University of California at Davis (hereinafter "Davis"). That program had set-aside sixteen of one hundred openings in the school's entering class specifically for minorities. The contention was that the program violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. V 1981) (hereinafter "Title VI"), and the Equal Protection Clause of the Fourteenth Amendment, *supra*. Five Justices reached the constitutional question on the theory that the program violated Title VI only if it also violated the Fourteenth Amendment. Four of the five found that the program violated neither. The fifth, Justice Powell, found that it violated both. The other four Justices, without reaching the constitutional issue, found that the program violated Title VI.

Announcing the judgment of the Supreme Court, and casting the decisive vote, Justice Powell confirmed that the special admissions program would be subject to strict scrutiny. 438 U.S. at 287-291. Thus, the burden fell on Davis to show "that its purpose or interest [was] both constitutionally permissible and substantial, and that its use of the classification [was] 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Id.*, at 305, *citing In re Griffiths*, 413 U.S. 717, 721-722 (1973); *Loving* v. *Virginia*, *supra*, at 11 (1969); *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964). Davis failed to shoulder that burden. The school could not justify its claim to a compelling interest in providing a remedy for past discrimination, 438 U.S. at 307-310, and

its program was only loosely related to its sufficient interest in such racial and ethnic diversity as would encourage the robust exchange of ideas, *id.*, at 311-315, 319-320. The program "totally excluded" non-minorities "from a specific percentage of the seats in an entering class." *Id.*

Two years after *Bakke*, *Fullilove* upheld a minority business enterprise preference which Congress had inserted into the Public Works Employment Act of 1977, Pub. L. 95-28, § 103(f)(2), 91 Stat. 116, 117 (1977) (hereinafter "PWEA"). The relevant provision limited federal grants for public works to those states and localities providing satisfactory assurance that they would allocate at least ten percent of their grants to MBEs unless the Secretary of Commerce were to grant a waiver. The *Fullilove* argument was that the preference violated the equal protection component of the Due Process Clause of the Fifth Amendment, U.S. Const. amend V. Six Justices voted to uphold the MBE requirement, but no more than three of the six joined in any one opinion. Three Justices dissented.

Chief Justice Burger announced the judgment of the Court, and delivered the plurality opinion. Without emphasizing conventional standards of review, the Chief Justice held that even Congress could "proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment" and "vigilant and flexible" administration, 448 U.S. at 490, for "[a]ny preference based on racial or ethnic criteria must receive a most searching examination . . . ," *id.*, at 491. Congress had "press[ed] the outer limits of congressional authority," *id.*, at 490, but had not exceeded its Spending Power, at least as that power had been informed by § 5 of the Fourteenth Amendment, *id.*, at 472-478.

Nor had Congress selected an improper means of pursuing its "strictly remedial" objectives. *Id.*, at 480-489. As the Chief Justice carefully reasoned, Congress had not

"inadvertently effected an invidious discrimination" by excluding groups which had suffered "a degree of disadvantage and discrimination equal to or greater than that suffered" by the included groups—Negroes, Spanish-speaking, Oriental, Indians, Eskimos and Aleuts. *Id.*, at 486. Congress had presumed that all of the members of these groups had suffered some degree of social or economic disadvantage, but it had also provided for rebuttal of that presumption as it might apply to any one MBE. *Id.*, at 487, 489. A waiver would be not only justified but also forthcoming where the MBE requirement would otherwise compel a general contractor to subcontract to an MBE at a price "inflated" by more than "the present effects of disadvantage or discrimination." *Id.*, at 470-471. To limit the MBE preference to the truly disadvantaged, the Secretary of Commerce had also created a special procedure for processing complaints that MBEs were unjustly participating in the program. *Id.*, at 471-472.

Congress had set an overall limit on the MBE preference, and as a result, the Chief Justice could assess the overall burden on innocent third parties. *Id.*, at 484-485. Further, the Chief Justice could rely on the PWEA's limited duration to guard against excess. *Id.*, at 489.

Justice Powell not only joined in Chief Justice Burger's plurality opinion, but also delivered a separate concurrence—specifically to confirm that the plurality's approach was consistent with *Bakke*. Emphasizing that the Supreme Court had "never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations,"[1] *id.*, at 497, Justice Powell explained that a legitimate interest in such remedies becomes compelling when "an appropriate governmental authority" has found such violations. *Id.*, at 498. Congress was such a body because it had been given "the unique constitutional power of legislating to

[1] *See also Bakke, supra*, at 302, 307 (Powell, J., concurring).

enforce the Thirteenth, Fourteenth and Fifteenth Amendments." *Id.*, at 500. The Chief Justice, for his part, had found it to be "fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.*, at 483.

Justice Powell further explained that "the enforcement clauses of the Thirteenth and Fourteenth Amendments" had given Congress not only new powers but also a "measure of discretion." *Id.*, at 508. Thus, the special characteristics of the MBE preference—especially its reasonable overall limit, and its limited duration—were sufficient to satisfy not only the Chief Justice but also Justice Powell that Congress had selected a permissible means.

The instant case bears a striking similarity to *Bakke*, in that the public body which ordered racial discrimination, for purportedly remedial purposes, has no claim to expertise in the field of racial discrimination, and because that body pursued absolutely fixed and rigid racial classifications. This case differs from *Fullilove* in that it does not concern Congress, or Congress' "unique constitutional role in the enforcement of the post-Civil War Amendments," on which *Fullilove* turned. *Id.*, at 516 (Powell, J., concurring). Further, Ordinance 82-67 suffers from precisely the kind of underinclusion and overinclusion which the PWEA carefully avoided, and omits both an overall limit and an expiration date. For all of these reasons, the United States Court of Appeals for the Eleventh Circuit should have held Ordinance 82-67, and its subsequent implementation, to be unconstitutional.[2]

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[2] Focusing on the dispositive opinions in *Bakke* and *Fullilove*, and the dispositive facts, does not guarantee that one will proceed from the analytical center of the several opinions which comprise each of those decisions, but it has far more to commend it than does the only alternative: relying on an artificial construct of where the

A. *The Board of County Commissioners for Dade County, Florida, is Not Competent to Identify Racial Discrimination and/or Fashion Appropriate Remedies.*

The Court of Appeals considered only the Commission's authority to waive competitive bidding, or promote the general welfare, avoiding any serious inquiry into the Commission's competence to determine that Black construction contractors had suffered racial discrimination in their business endeavors. The Court of Appeals also avoided any serious inquiry into the Commission's competence to fashion appropriate remedies—though such remedies would inevitably impose a racial burden on innocent third parties. "[I]solated segments of our vast governmental structures are not competent" to impose racial burdens on third parties, *Bakke, supra*, at 309 (Powell, J., concurring), for they are not "charged with the responsibility" to identify past discrimination, or to fashion remedies, *id.*, at 301. *Cf. Hampton* v. *Mow Son Wong*, 426 U.S. 88 (1976).

Because it limited its inquiry, the Court of Appeals overlooked and neglected the critical fact that the Commission had no special or unique "charge" to identify or remedy racial discrimination. The Commission had no claim to the necessary expertise. Section 5 of the Fourteenth Amendment, U.S. Const. amend. XIV, § 5, speaks only to Congress, "authorizing *Congress* to exercise *its* discretion in determining whether and what Legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966) (emphasis added). *Accord, Ex Parte Virginia*, 100 U.S. 339 (1879). *See* Bohrer, *Bakke, Weber and Fullilove: Benign Discrimination and Congressional*

Bakke and *Fullilove* Courts would have been had they reached a consensus. One cannot honestly reconcile what the Justices of this Court could not reconcile themselves.

Power to Enforce the Fourteenth Amendment, 56 Ind. L. J. 473 (1981).[3]

As a further illustration, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981) (hereinafter "Title VII") expressly empowers the Equal Employment Opportunity Commission to identify and remedy racial and other discrimination in employment, *id.*, at §§ 2000e-5, 2000e-8, 2000e-9, and even requires that federal agency to defer to certain state agencies, *id.*, at § 2000e-5, but Title VII does not confer any special responsibilities for the enforcement of civil rights on the Dade County Commission or its counterparts even in the field of employment. As in the case of the Equal Protection Clause, Title VII serves only to limit the Commission's discretion.

What the facts of this case amply demonstrate is precisely the need for an inquiry into the competence of the body which would compel racial discrimination for ostensibly remedial purposes. The Commission plunged ahead with its "finding" of prior racial discrimination though the statistics had revealed that the construction going to Blacks in 1977 had *exceeded* their availability for that year, and further, they had revealed that the percentage of the Metrorail construction going to Blacks was five times higher than the percentage of all work for 1977.[4]

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[3] Far from a co-equal branch of the federal government, the Commission is a subdivision of a single state. *Compare Fullilove, supra*, at 472 (Burger, C.J., concurring).

[4] The school desegregation cases, *e.g. Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green* v. *County School Board*, 391 U.S. 430 (1968), are entirely distinguishable from this case. Unlike racial discrimination in the construction industry, racial segregation in public education is readily identifiable. A local school board may have to derive certain figures, but it does not have to interpret those figures. The evil lies in the naked racial imbalance. Moreover, the racial integration of public education does not deprive innocent third parties of any opportunity

B. *The Commission Did Not Make Adequate Findings of Prior Discrimination.*

Bakke and *Fullilove* further required the Court of Appeals to determine that the Commission, even if competent, had nevertheless failed to make adequate findings of prior discrimination. Generalized concern over "societal discrimination" is simply not sufficient. *Bakke, supra*, at 310 (Powell, J., concurring). The single "finding" in the record of this case does not even purport to be more than an assertion of general concern over "our present economic system." [5]

Whether or not the Commission had to identify specific constitutional or statutory violations, it had to identify discrimination in at least some kind of the common sense in which that term is understood. Legally, the term implies something purposeful. *See General Building Contractors Association* v. *Pennsylvania*, 458 U.S. 375 (1982) (§ 1981); *Bakke, supra*, (Title VI); *Washington* v. *Davis*, 426 U.S. 229 (1976) (Equal Protection Clause). *Compare Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (Title VII). As a statistical matter, the term requires

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which they would otherwise have. In ordering such racial integration, local school boards are not imposing significant racial burdens on innocent third parties. Such integration is not a zero-sum game.

[5] At one point, the District Court made its own finding of "identified discrimination." The court adverted to the studies of Dade County, and then volunteered:

> Although "societal discrimination" may be the ultimate cause of the extremely low percentage of Black contractors doing business in Dade County, there is evidence in this record from which the Court can find *identified discrimination* against Dade County Black contractors at some point prior to the county's present affirmative action program. 552 F. Supp. at 925-926 (emphasis in original).

The evidence which the District Court had in its mind remains far from clear, but in any case, the finding is irrelevant to the question presented, for the question goes to the county's conduct, and not the District Court's. The county and not the court ordered racial discrimination against all non-Black contractors.

comparison of at least similar phenomena. One cannot find any evidence of discrimination in the Commission's comparison of total population to construction contractors —a comparison of the unskilled, inexperienced, and even the young, to successful corporate executives. *See Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n. 13 (1977). And even if sound statistical practice were to permit that kind of comparison, the common sense of discrimination would still require at least one specific example of its effect on Black construction contractors. The Commission made *no* meaningful findings of prior discrimination.[6]

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[6] This Court has gone so far as to suggest that "discrimination in the construction trades on racial grounds" is "a proper subject for judicial notice." *United Steelworkers* v. *Weber*, 443 U.S. 193, 198 n.1 (1979). Whether or not such a broad indictment of the construction trades was necessary or appropriate, the fact remains that this case has nothing to do with the construction trades. This case concerns the conduct of unidentified owners or developers, whether public or private, in doing business with general contractors, and further, the conduct of general contractors in doing business with subcontractors. The construction trades represent construction employees, and may encourage owners and developers to use the general contractors with which the trades have collective bargaining agreements. They may also encourage general contractors to use the subcontractors with which they have agreements. The construction trades do not, however, have any direct input into the decisions which lie at the heart of this case.

Even as to employment, with which the construction trades are overwhelmingly concerned, this Court has held that the trades play an independent role. "The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest.' " *General Building Contractors Association* v. *Pennsylvania, supra*, at 394, *quoting NLRB* v. *Insurance Agents*, 361 U.S. 477, 488 (1960).

C. *The Set-Aside Provision of Ordinance 82-67 And The Board's Use Of That Provision Are Not Tailored to Fit Their Purportedly Remedial Purpose.*

Fullilove teaches that racially remedial programs are fatally underinclusive if they exclude groups which can rightfully claim to have suffered from discrimination to the same degree as the included groups. *Bakke* teaches that such programs are unconstitutional if they are absolutely fixed and rigid, and *Fullilove* further explains that such rigidity can cause the programs to be fatally overinclusive. In *Fullilove* itself, the Secretary of Commerce had created not one but two mechanisms for the enforcement of the specific mandate that the MBE preference go to only victims of racial discrimination. Finally, *Fullilove* teaches that such programs have to be limited in their duration, and otherwise provide assurance that they will not impose an undue burden on innocent third parties. Nevertheless, the Court of Appeals, in upholding the Commission's action, considered only the procedures which the Commission would follow in setting-aside a general contract, the minimum criteria for the Commission's consideration of a set-aside, and the annual review of the ongoing program. Thus, the Court of Appeals avoided the critical issues—however one may characterize the required relationship between means and ends.

The set-aside provision in Ordinance 82-67 is underinclusive both on its face and as applied to the Earlington Heights station, for it reflects the Commission's narrow focus on Blacks, and therefore excludes many groups and individuals which may well have suffered racial discrimination to the same degree as Blacks. The provision draws an invidious line between not only Blacks and Whites, but also between Blacks and other minority groups. Unlike the PWEA, which encompassed not only Blacks, but also the Spanish-speaking, Oriental, Indians, Eskimos and Aleuts, Ordinance 82-67 discriminates against the members of those other minorities.

With equal if not greater certainty, the set-aside provision is also overinclusive, for the provision extends a racial preference to all Black prime contractors, whether or not they have ever suffered any racial discrimination in their business endeavors. Nowhere does the record reveal any procedure for the exclusion of those Black contractors who have had their costs inflated, not by racial discrimination, but by wholly neutral factors. Nowhere does the record reveal any procedure for the Commmission to consider complaints of unjust participation.[7] The ordinance creates a *conclusive* presumption that *all* Black contractors have suffered racial discrimination in their business endeavors.

Further, the implementing regulations completely disregard the possibility that a Black contractor may have never had any contact with Dade County or even the State of Florida. Dade County had no major Black prime contractors. When the Commission implemented the set-side provision, it had to solicit bids from all over the country. How could the Commission plausibly claim that awarding the Earlington Heights station to an Illinois firm would remedy racial discrimination against Dade County residents? [8]

The set-aside provision substitutes a single racial classification for *any* consideration of individual harm.

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[7] The Court of Appeals heavily focused on the administrative procedure which the Commission would follow before setting aside a contract. That procedure does not, however, guard against overinclusion.

[8] By comparison, the Conference Report on the PWEA had specified that the MBE provision before the *Fullilove* Court would be " 'dependent on the availability of minority business enterprises located in the project area.' " *Fullilove, supra,* at 462 (Burger, C.J., concurring), *quoting* S. Conf. Rep. No. 95-110, 95th Cong., 1st Sess. 11 (1977); H.R. Conf. Rep. No. 95-230, 95th Cong., 1st Sess. 11 (1977).

And it ignores any geographical boundaries. And it further ignores any temporal boundaries. The ordinance calls for annual reports, but extends into the indefinite future. The ordinance shifts the political burden of persuasion from the proponents to the *opponents* of racial discrimination. The ordinance may be subject to reassessment and reevaluation, but not *prior to* its further operation—and without providing any other assurance that the review will be the kind of meaningful and intensive review which *Fullilove* contemplates.

Finally, the ordinance provides no assurance that its burden on innocent third parties will reach or maintain reasonable levels. In fact, the ordinance provides no means of even assessing that burden, for it sets no overall limit. Taking the Court of Appeals' approach to the issue, and therefore considering only the impact of any one set-aside, one could reach the conclusion that the set-aside provision does not impose an undue burden on innocent third parties even though the Commission had set-aside 100% of its contracts. The Court of Appeals would permit public authorities readily to escape any kind of meaningful judicial review of the impact of their racial discrimination.[9]

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[9] One further error in the Court of Appeals approach is that it implies that the burden of the set-aside would fall evenhandedly on all non-Black construction contractors. The court's implication was that the set-aside, because less than one percent of the county's annual expenditures on construction, would affect no more than one percent of any one non-Black construction contractor's business. The reality is that the set-aside would have a heavy impact on certain construction contractors, and no impact on others. To begin with, it would target general contractors, and might have no impact on any subcontractors.

The construction industry is not a monolithic whole. Construction comes in an infinite variety, and specialization is often the key

The set-aside provision in Ordinance 82-67, and the Commission's subsequent use of that provision, are both too narrow and too broad to remedy racial discrimination against Dade County residents. The Court of Appeals should have considered the many disparities between the Commission's action and the Commission's ostensible purpose, and further, the Court of Appeals should have recognized the significance of the provision's two omissions: its omission of any expiration date, and its omission of any overall cap on the amount to be set-aside. For all of these independent reasons, the Court of Appeals should have held that the provision, and the Commission's use of the provision, could not pass the means test.

D. *The Subcontract Provision of Ordinance 82-67 And The Commission's Use Of That Provision Are Not Tailored to Fit Their Purportedly Remedial Purpose.*

On its face, and as applied, the subcontract provision is as underinclusive as the set-aside provision. For that reason, and further, because the provision extends into the indefinite future, and sets no overall limit,[10] the Court of Appeals should have also held that the subcontract provision is unconstitutional.

The subcontractor goals are theoretically subject to waiver, in that general contractors failing to meet the

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to survival. One cannot even begin to assess a set-aside's impact on innocent third parties until one correctly identifies the number of construction contractors which would normally participate in the relevant segment of the market.

[10] The subcontracting goals impose a great burden on not only the subcontractors which find themselves excluded from the relatively narrow markets for their specialties, but also the general contractors which have to assume a great financial risk in taking a marginally competent and inexperienced subcontractor. The general contractor has the ultimate legal responsibility for the completion of the project. If a subcontractor fails to perform, then the general contractor has to compensate for that failure. The financial risks can be tremendous.

goals may assert, in their defense, that they nevertheless made every reasonable effort to meet the goals. Even the Court of Appeals, however, equated the subcontractor goals with the inflexible set-asides. Thus, "[w]hen combined with the general requirement that the prime contractor personally perform twenty-five percent of the contract, [the fifty percent subcontractor goal on the Earlington Heights station] meant that seventy-five percent of the contract was being set-aside solely for Black contractors." 723 F.2d at 849. The Court of Appeals further conceded that "the effect of the 50% figure, although designated a 'goals' provision, is to *set-aside* 50% of the contracts value for Black contractors." *Id.*, at 856 (emphasis in original.) Thus, the subcontract and set-aside provisions both also neglect *Bakke's* most straightforward requirement: that public authorities avoid rigid and inflexible racial quotas.

CONCLUSION

For the foregoing reasons, Amicus AGC respectfully requests the Supreme Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

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